IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 7, 2007 Session

IN THE MATTER OF: B.P.C.

Direct Appeal from the Juvenile Court for Sumner County
No. 76-44 Barry R. Brown, Judge

No. M2006-02084-COA-R3-PT - Filed on April 18, 2007

The father of a nineteen month old child appeals an order terminating his parental rights on grounds of abandonment, noncompliance with permanency plan requirements, and persistence of conditions. On April 5, 2006, the Department of Children's Services ("DCS") petitioned to terminate the parental rights of D.L.C. ("Father"), the nineteen year old father of B.P.C., on the foregoing grounds. As of the filing date, Father was incarcerated for the second time since B.P.C.'s birth for reasons related to his crack cocaine habit. He had visited his son only once, unannounced and unapproved by DCS, within the relevant four month "abandonment" period. On the day of the last approved visit attended by Father, the court ordered him to pay twenty-five dollars ($25) per week in child support, but he never remitted any support payments for the benefit of his son. At the termination proceedings on August 25, 2006, Father was newly released from jail and testified to being drug-free at that time. He proposed to care for B.P.C. in the home of his father, where he was living rent-free, until he could secure a job and housing. Father confirmed the child abuse he suffered at the hands of his father as well as his history of depression, including multiple suicide attempts. Following the termination proceeding, the court entered an order on September 15, 2006, terminating Father's parental rights on all of the grounds alleged by DCS and on a best interests determination in favor of termination. From this order, Father appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Randy P. Lucas, Gallatin, Tennessee, for the appellant, D.L.C, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter, Amy T. McConnell, Assistant Attorney General, for the State of Tennessee, Department of Children's Services.

OPINION

D.L.C., the father of B.P.C., appeals the juvenile court's order terminating his parental rights on the grounds of abandonment, noncompliance with the permanency plan, and persistence of conditions, and upon a finding that termination was in the best interests of B.P.C. We find that there was insufficient evidence to support Father's noncompliance with permanency plan requirements where the Department of Children's Services (DCS) never entered the plan into evidence. Likewise, because B.P.C. came into custody as a result of injuries caused by his mother and was removed from her home, and not that of Father, we find that the lower court erred in finding clear and convincing evidence of persistence of conditions. Notwithstanding these facts, Father developed a crack cocaine habit, engaged in criminal conduct to support it, was incarcerated twice for this conduct, made no child support payments, and had visited his son only once, unannounced and unapproved by DCS, within the relevant four month "abandonment" period. We affirm the lower court's order because clear and convincing evidence established that Father had abandoned B.P.C. (according to the definition of abandonment under Tennessee Code Annotated Section 36-1-102(1)(A)(iv)) and that the termination of his parental rights was in the best interests of B.P.C.

Facts and Procedural History

B.P.C. entered the protective custody of the State at three (3) weeks of age following his hospitalization for severe injuries, including a skull fracture, admittedly caused by B.P.C.'s mother. B.P.C. was born out of wedlock on January 18, 2005, but D.L.C., his biological father ("Father"), was identified on the birth certificate as a result of his voluntary acknowledgment of paternity at B.P.C.'s birth. It appears that B.P.C. was in the care and custody of his mother when he sustained the injuries. She voluntarily surrendered her parental rights and thus is not a party to this action. A protective custody order dated February 25, 2005, reflected that B.P.C.'s mother had confessed to causing the infant's injuries and that Father was "in need of assistance in learning to appropriately parent such a young infant." The caseworker from the Department of Children's Services (DCS) testified at the termination proceedings that, at the time B.P.C. came into custody, Father was living in a motel with a girlfriend/fiancee, had no provisions for caring for an infant, and told her he did not believe he could care for his son at that point.

Father's early involvement displayed concern for his son's well-being. Indeed, he petitioned the court to investigate his son's injuries and, following the entry of the protective order, discussed the contents of the permanency plan with the caseworker and signed the document. He testified that he understood that DCS would petition to terminate his parental rights if he failed to visit or pay child support. The caseworker testified that the plan required Father, among other things, to obtain safe and stable housing, submit to a parenting assessment, and have his fiancee attend free parenting classes. He completed the parenting assessment, the results of which indicated he would need some in-home services such as counseling and supervision during visitations. DCS contends that Father complied with nothing beyond the parenting assessment itself. It appears that multiple plans were completed, one of which the court ratified, but DCS never entered the permanency plan(s) into evidence.

Father complied with the initial plan of supervised visitation twice a week. The schedule quickly progressed to allow for unsupervised visits with B.P.C., but the DCS caseworker testified that at some point in June of 2005, problems with the visits began to occur. For example, B.P.C. would return from visits with the same diaper he wore when he left, and Father was offering him inappropriate foods for his age. The caseworker then called Father to voice her concerns and to state that the next visits would have to take place in specified locations. Although she left a message to this effect, she never received a return call from him. He cancelled the two visits prior to the last one he attended on July 6, 2005. B.P.C. was approximately six (6) months old at the last approved visit with his father in July. That same day, the court ordered the father to pay twenty-five dollars ($25) per week in child support, but he never remitted any form of support payments. The DCS caseworker testified that, at least until July 6, 2005, B.P.C.'s father was employed.[1] Father severed contact with DCS after that day. The DCS caseworker stated that she attempted to contact him but could not reach him at the telephone number he had provided. Instead, when she called his cellular telephone number, someone would answer without saying anything, and she would hear only music in the background.

Father had no contact with B.P.C. from July 6, 2005, until the following November. In November of 2005, Father unexpectedly (and without DCS approval) appeared at a supervised visit between B.P.C. and his paternal grandfather; at that time, DCS offered to establish a new visitation schedule for Father but never received a response from him. At the termination proceeding, Father testified that, also unknown to DCS, he visited with B.P.C. on December 29, 2005. That day, Father turned nineteen (19) years old.

According to his testimony, Father attributed his failure to meet DCS requirements to his use of crack cocaine. When asked why he had not met them, he stated, "[t]o be 100 percent honest, I had a crack cocaine habit that I was supporting." And, even though he understood the likely consequence of failing to visit and pay child support, he conceded at trial to thinking crack cocaine was more important than compliance at the time he was using it. Father's drug habit led to two periods of incarceration. The first period was November 23, 2005, to December 21, 2005. The second period of incarceration lasted from March 6, 2006, to August 24, 2006, and was imposed for aggravated burglary and theft under $500, offenses Father admitted at trial were related to his drug habit. He contends he wrote and called the DCS caseworker during his incarceration but never received a response. The DCS caseworker, however, denied ever hearing from him. Moreover, Father testified that his father (B.P.C.'s paternal grandfather) had been in contact with the caseworker during that period but conceded that he never asked his father to speak on his behalf, to demand that DCS respond to the letters he claimed he sent, or to ask that DCS allow for visitation between B.P.C. and his incarcerated father.

DCS petitioned for the termination of Father's parental rights on April 5, 2006, and alleged abandonment, substantial noncompliance with permanency plan requirements, and persistence of

[1] Father, however, made the general assertion at trial that he was not employed prior to his incarceration. It is unclear which incarceration Father had in mind.

conditions as grounds for termination. DCS also averred that termination was in the best interests of B.P.C. given the underlying facts and the reality that B.P.C. had no meaningful relationship with his father.

At the time of trial, August 25, 2006, Father was newly released from jail, purportedly drug-free, and living in his father's home rent-free. Father testified that his drug use resulted from his attempt to self-medicate for depression but stated that antidepressant medication was helping him maintain control over the symptoms. He planned to live with his father until he could find a job and afford appropriate housing. Yet, he testified that he was aware that DCS would never allow B.P.C. to reside in the same home as his paternal grandfather because of the grandfather's history of abusive conduct toward B.P.C.'s father.[2] Moreover, Father had a significant juvenile history with DCS, including "juvenile justice" issues and multiple suicide attempts.

At the time of the proceedings, B.P.C. was approximately nineteen (19) months old and thriving in the care of his great aunt, who had expressed a desire to adopt him. Placed with his great aunt on April 29, 2005, B.P.C. had been living with her since he was approximately three (3) months of age.

The court entered an order terminating Father's parental rights on September 15, 2006. In its order, the court made the following findings of fact and conclusions of law, reproduced below in pertinent part:

> The minor child . . . was placed in the protective custody of the State of Tennessee, Department of Children's Services by the Court due to neglect-dependence on February 9, 2005 and has remained in foster care since that date.
> [Father] was ordered to pay Twenty-Five ($25.00) Dollars per week for support of the minor child on July 6, 2005 and has made no payments whatsoever.
> [Father] has not visited the minor child with the Department's knowledge since July 6, 2005, although he apparently managed to see the baby on one occasion over the holidays without notifying the DCS case manager of his intentions.
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> [Father] testified that he was in the Sumner County Jail from approximately November 23, 2005 until December 21, 2005, and again from approximately March 6, 2006 until August 24, 2006.

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[2] One episode involved an allegation that his father (B.P.C.'s grandfather) tried to set him (B.P.C.'s father) on fire. It is unclear from the trial transcript whether Father even disputed this fact. Prior to Father's taking the stand, the DCS caseworker testified about his history with the agency and mentioned this particular episode. She stated that "he was involved with DCS in our juvenile justice side, issues with his father, and I know at one point his father had tried to set him on fire, just various issues and various mental issues . . . ." Upon taking the stand, Father stated that he did not dispute the prior statements regarding his history and admitted to a volatile relationship with his father. Counsel for DCS questioned Father as follows: "[Y]our father tried to set you on fire, did he not? And that's who you think we should put your son with?" Father replied: "It depends on how you word it. No, not one single time did I ever say put my son with my father."

[Father] testified that he had a crack cocaine habit in the summer of 2005 and that his drug addiction was the reason he was unable to comply with the permanency plan and stopped visiting his son.

The DCS made reasonable efforts to reunite [Father] with his son for more than four (4) months following removal of the child. They arranged for a parenting assessment for [Father], referred him to a free parenting class and offered to assist him with locating appropriate housing. The DCS case manager also facilitated and supervised visits between [Father] and his son.

[Father] was cooperative with the DCS for approximately five (5) months, although his efforts began to slack off as time went on. He subsequently got evicted from his residence, disappeared, and the DCS case manager could not locate him until he turned up in the Sumner County Jail. . . .

[Father] . . . testified that he was released from jail just yesterday and that he does not yet have a job but is staying with his father, and is welcome to stay there for as long as he needs to get on his feet.

The Department has a long history with the family and there is a history of [B.P.C.'s paternal grandfather] abusing [Father] when he was a minor, including but not limited to an incident where it was alleged that he attempted to set the [Father] on fire. The Department would not be able to place the minor child or allow visits to take place in the [grandfather's] home, thus further delaying permanency for [the child] if reunification were to be attempted.

There is also a history of instability on the part of [Father], including but not limited to some mental health issues that he was resistant to addressing as a teenager.

[The child] has been placed in a relative foster home since approximately two and one-half months after his removal from his parents and the DCS case manager testified that he is happy and thriving in that home. His maternal aunt wants to adopt him.

The Court finds that [B.P.C.] has been removed from [Father] for more than eighteen (18) months and that there is little likelihood of [Father] being able to remedy the conditions that are a barrier to reunification within a reasonable amount of time for this very young child. There is no longer any meaningful relationship between [Father] and the minor child, and it is in [B.P.C.'s] best interest that he be freed for adoption.

Thus, the Court finds that the [DCS] has proven by clear and convincing evidence that grounds for termination of parental rights exist and has proven by clear

and convincing evidence that it is in the best interest of the child that all the parental rights of [Father] . . . be . . . terminated . . . .

. . . .

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED:

1. That [Father] . . . willfully abandoned the minor child . . . for more than four (4) consecutive month prior to his incarceration; that prior to incarceration he engaged in conduct exhibiting a wanton disregard for the welfare of the child; that for the four (4) months following removal, DCS made reasonable efforts to assist the parent in establishing a suitable home for the child, but the parent made no reasonable effort to provide a suitable home and has demonstrated a lack of concern for the child to such a degree that it appears unlikely that he will be able to provide a suitable home at an early date; that he has been substantially non-compliant with the statement of responsibilities in the plan of care; that the child has been removed from the custody of the parent for more than six (6) months; that the conditions that led to the child's removal still exist or other conditions exist which would in all probability subject the child to further neglect or abuse if returned home; that there is little likelihood that these conditions will be remedied at an early date so that the child could be returned to [Father] in the near future; that the continuation of the parent/child relationship greatly diminishes the child's chances of early integration into a stable and permanent home; and that it is in the best interest of the child that all the parental rights of [Father] to said child be forever terminated . . . .

On appeal, Father challenges the court's findings regarding abandonment, persistence of conditions, and B.P.C.'s best interests.

Issues Presented

We restate below the issues raised by Father on appeal:

(1) Whether the evidence supports a finding by clear and convincing evidence that his parental rights should be terminated for persistent conditions;

(2) Whether the evidence supports a finding by clear and convincing evidence that his parental rights should be terminated for abandonment; and

(3) Whether the evidence supports a finding by clear and convincing evidence that the termination of his parental rights is in the best interests of the child.

Standard of Review

We review the decisions of a trial court sitting without a jury *de novo* upon the record. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). There is a presumption of correctness as to the trial court's findings of fact, unless the preponderance of evidence is otherwise. *Id.*; Tenn. R. App. P. 13(d). No presumption of correctness attaches, however, to a trial court's conclusions on issues of law. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000); Tenn. R. App. P. 13(d).

We must also account for the more stringent standard of proof applied to parental termination cases. Tennessee Code Annotated Section 36-1-113 governs the termination of parental rights. The Code provides, in pertinent part, as follows:

> (c) Termination of parental or guardianship rights must be based upon:
> (1) A finding by the court by clear and convincing evidence that the grounds for termination or parental or guardianship rights have been established; and
> (2) That termination of the parent's or guardian's rights is in the bests interests of the child.

Tenn. Code Ann. § 36-1-113(c) (2005).

To sever the parent-child relationship, a court must insure that clear and convincing evidence supports such a drastic measure. *In re Valentine*, 79 S.W.3d at 546. Clear and convincing evidence is "evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Id.* (quoting *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). Requiring a level of certainty between "beyond a reasonable doubt" and by the "preponderance of the evidence," the "clear and convincing" standard demands a high probability that the facts asserted are true. *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992). Such evidence should produce in the fact-finder's mind a firm belief or conviction as to the truth of the allegations sought to be established. *Brandon v. Wright*, 838 S.W.2d at 536; *Wiltcher v. Bradley*, 708 S.W.2d 407, 411 (Tenn. Ct. App. 1985). Thus, although we review individual factual findings under the preponderance standard, we consider the combined weight of those established facts to determine whether they clearly and convincingly support the elements required for terminating parental rights. *In re Tiffany B.*, No. M2006-01569-COA-R3-PT, 2007 WL 595369, at *6 (Tenn. Ct. App. Feb. 26, 2007), *perm. app. pending*; *In re Giorgianna H.*, 205 S.W.3d 508, 516 (Tenn. Ct. App. 2006); *Kleshinski v. Kleshinski*, No. M2004-00986-COA-R3-CV, 2005 WL 1046796, at *17 (Tenn. Ct. App. May 4, 2005)(*no perm. app. filed*).

As noted above, a court may terminate parental rights when at least one statutory ground for termination exists and when the termination of those rights is in the best interests of the child. Tenn. Code Ann. § 36-1-113(c) (2005). Clear and convincing evidence must support each of these requirements. *In re Adoption of A.M.H.*, No. W2004-01225-SC-R11-PT, 2007 WL 160953, at *13 (Tenn. Jan. 23, 2007); *In re Valentine*, 79 S.W.3d at 546. First, every termination case requires the court to determine whether the parent whose rights are at issue has chosen a course of action, or

inaction, as the case may be, that constitutes one of the statutory grounds for termination. *In re Adoption of Muir*, No. M2002-02963-COA-R3-CV, 2003 WL 22794524, at *3 (Tenn. Ct. App. Nov. 25, 2003) (*no perm. app. filed*); *see generally* Tenn. Code Ann. § 36-1-113(g)(1)-(9) (2005). But, not every circumstance evidencing parental unfitness justifies the termination of parental rights; indeed, the existence of a statutory ground for termination does not end the matter. Once a court finds that clear and convincing evidence proves the existence of at least one statutory ground, the inquiry then shifts to the child's best interests. When a court considers the factors set forth in Section 36-1-113(I) of the Tennessee Code, viewed from the child's perspective, and concludes that termination is in the child's best interest, then the entry of a termination order is appropriate.

The gravity of termination proceedings mandates individualized decision making. *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999). And by statute, trial courts must enter termination orders with specific findings of fact and conclusions of law supporting their decisions. Tenn. Code Ann. § 36-1-113(k) (2005). Moreover, to facilitate appellate review and to avoid undue delay in the child's permanent placement, the trial court should include in its order findings and conclusions that address each ground raised. *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003). A remand is necessary when the trial court fails to comply with the Tennessee Code's requirements, *supra*, for termination orders. *Id.*

Analysis

A court may terminate parental rights when at least one statutory ground for termination exists and when the termination of those rights is in the best interests of the child. Tenn Code Ann. § 36-1-113(c) (2005). Clear and convincing evidence must support each of these requirements. *In re Adoption of A.M.H.*, 2007 WL 160953, at *13; *In re Valentine*, 79 S.W.3d at 546.

On appeal, Father challenges the lower court's termination of his parental rights and asserts that he was unable to support and visit B.P.C. because of his incarceration; that DCS prevented him from visiting B.P.C.; that the court's findings failed to establish abandonment by failure to visit; that DCS failed to provide services to assist him in meeting his obligations during his incarceration; and that the court's best interest determination was deficient because it did not specify how the statutory best interests factors applied to this case. He urges this Court to reverse the judgment, remand the case to the juvenile court, and direct that it implement a plan to reunify Father and B.P.C. Because clear and convincing evidence supports the ground of abandonment and the court's best interests determination, we affirm the court's order terminating Father's parental rights.

Grounds for Termination

Section 36-1-113(g) of the Tennessee Code identifies nine statutory grounds for the termination of parental rights. *See* Tenn. Code Ann. § 36-1-113(g)(1)-(9) (2005). The juvenile court found that three grounds for termination were established by clear and convincing evidence: abandonment, substantial noncompliance with the permanency plan, and persistence of conditions. Tenn. Code Ann. § 36-1-113(g)(1), (2), (3). Father argues that the record lacks clear and convincing

evidence of the existence of abandonment and persistence of conditions. DCS, on the other hand, argues in support of the abandonment ground only, acknowledging that the grounds of persistence of conditions and noncompliance with the permanency plan lack support in the record. We now address each one in turn.

1. Persistence of Conditions and Substantial Noncompliance with Permanency Plan Requirements

The juvenile court found that Father had not remedied the conditions originally identified in February of 2005 and had not met his obligations as set forth in the permanency plan. It thus ruled that clear and convincing evidence established the existence of the following grounds for termination: persistence of conditions and substantial noncompliance with permanency plan obligations. We disagree.

Tennessee Code Annotated Section 36-1-113(g)(3) identifies a ground for termination commonly known as "persistence of conditions." *See* Tenn. Code Ann. § 36-1-113(g)(3) (2005). It applies when:

> The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:
>
> (i) The conditions which led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s) still persist;
>
> (ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and
>
> (iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

Tenn. Code Ann. § 36-1-113(g)(3)(A) (2005). DCS concedes, in effect, that it did not prove this ground by clear and convincing evidence because B.P.C. was not removed from Father's home. Additionally, Father was apparently not involved in the abusive events leading to B.P.C.'s injuries and removal. Because the actions of B.P.C.'s mother led to his removal from her home (and not Father's) and because DCS did not pursue persistence of conditions on appeal for this reason, we find the lower court erred when it relied on this ground. *Cf. In re T.L.*, No. E2004-02615-COA-R3-PT, 2005 WL 2860202, at *7 (Tenn. Ct. App. Oct. 31, 2005), *perm. app. denied* (Tenn. Feb. 17, 2006)(finding no failure to remedy persistent conditions where child was not removed from the father's home); *In re D.L.B.*, No. W2001-02245-COA-R3-CV, 2002 WL 1838147, at *9 (Tenn. Ct. App. Aug. 6, 2002)(considering action against the father and finding persistence of conditions

unsupported by the evidence where the child was removed from the mother's home), *rev'd on other grounds*,118 S.W.3d 360 (Tenn. 2003).

Similarly, we find that substantial noncompliance with the permanency plan requirements was not proven by clear and convincing evidence. A permanency plan specifies, among other things, what the parent must do or achieve in order for reunification (or another appropriate goal) to take place. Tenn. Code Ann. § 37-2-402(8), -403(a)(1). The Code mandates that the plan identify in specific terms what DCS requires of the parent and that those obligations be reasonably related to the goal of reunification (or another appropriate goal). Tenn. Code Ann. § 37-2-403(a)(2)(A) (2005). The parent's substantial noncompliance with those obligations, if proven by clear and convincing evidence, constitutes a ground for terminating parental rights. Tenn. Code Ann. § 36-1-113(g)(2) (2005). In this case, the permanency plan was never admitted into evidence and so cannot form the basis for terminating parental rights. This Court has previously held that the relevant permanency plan must be admitted into evidence before the trial court, or a reviewing appellate court, can determine whether clear and convincing evidence supports a finding of substantial noncompliance with permanency plan requirements. *In re A.J.R.*, No. E2006-01140-COA-R3-PT, 2006 WL 3421284, at *4–5 (Tenn. Ct. App. Nov. 28, 2006)(*no perm. app. filed*); *Dep't of Children's Servs. v. D.W.J.*, No. E2004-02586-COA-R3-PT, 2005 WL 1528367, at *3 (Tenn. Ct. App. June 29, 2005)(*no perm. app. filed*). Nor is the DCS caseworker's testimony a sufficient substitute for establishing the plan's terms. *In re A.J.R.*, 2006 WL 3421284, at *5; *Dep't of Children's Servs. v. D.W.J.*, 2005 WL 1528367, at *3. Finally, DCS acknowledges these points and likewise has not pursued this ground on appeal. Accordingly, we hold that DCS did not establish Father's substantial noncompliance with the permanency plan requirements. We now turn to the mutually disputed and pivotal ground for termination, abandonment.

2. Abandonment

In response to Father's argument on appeal, DCS asserts that clear and convincing evidence supports the lower court's finding of abandonment. Tenn. Code Ann. § 36-1-113(g)(1) (2005)(recognizing abandonment as a ground for termination). DCS proceeds under section 36-1-102(1)(A)(iv), which defines "abandonment" to mean that

> [a] parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or has willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration, or the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child[.]

Tenn. Code Ann. § 36-1-102(1)(A)(iv)(2005). Applicable only when the parent is incarcerated at or near the time the termination petition is filed, this provision contains two tests for abandonment. The first test involves the willful failure to visit or support the child during the four (4) consecutive months immediately prior to the parent's incarceration. *See id.*; *In re: Audrey S.*, 182 S.W.3d 838, 865 (Tenn. Ct. App. 2005). The second test supports a finding of abandonment where the parent's conduct prior to incarceration shows a wanton disregard for the child's welfare. *See* § 36-1-102(1)(A)(iv)*; In re: Audrey S.*, 182 S.W.3d at 865. Under the second test, no specified time frame limits which pre-incarceration acts or omissions are subject to review. *In re: Audrey S.*, 182 S.W.3d at 865, 871.

With respect to the ground of abandonment, the juvenile court found that Father "willfully abandoned [B.P.C.] for more than four (4) consecutive months prior to his incarceration [and] that prior to incarceration he engaged in conduct exhibiting a wanton disregard for the welfare of the child." DCS contends that clear and convincing evidence proved that Father willfully failed to visit his son, willfully failed to support his son, and displayed a wanton disregard for his son's welfare prior to his incarceration. Father, on the other hand, merely addresses his failure to visit and support during the period of incarceration. He argues that his incarceration prevented him from making support payments and from visiting B.P.C. and that, despite his attempts to contact DCS, it refused to allow visitation. Father's argument ignores that our legislature has broadened the scope of inquiry where incarceration prevents a fair application of the traditional test for abandonment.[3]

The first test of abandonment under section 36-1-102(1)(A)(iv) "prevents a parent from relying on his or her own criminal behavior and resulting imprisonment as a defense [in termination proceedings] by allowing the court to examine the record of visitation and support during the most recent four-month period for which the excuse of incarceration is unavailable." *In re: Audrey S.*, 182 S.W.3d at 866. Because only slightly less than three months separated the periods of incarceration, the relevant time period for the first test extends from July 23, 2005, to November 23, 2005, the four (4) month period preceding Father's first incarceration. During this four (4) month time period, Father made no support payments for the benefit of B.P.C. and saw him only once, in the month of November.

A parent willfully fails to visit when he or she, for a period of four (4) consecutive months, does not visit or engage in more than token visitation. Tenn. Code Ann. § 36-1-102(1)(E) (2005). The Tennessee Code defines token visitation as "nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child." *Id.* § 36-1-102(1)(C). The lower court's finding suggests that Father engaged in nothing more than token visitation:

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[3] Tennessee Code Annotated Section 36-1-102(1)(A)(i) sets forth the same definition as the first test provided in subsection (iv), but its focus is the four (4) months immediately preceding the filing of a petition to terminate parental rights. *See* Tenn. Code Ann. § 36-1-102(1)(A)(i) (2005). Incarceration often hinders a parent's ability to pay child support and to visit with the child. Thus, a parent who is incarcerated at or near the time of filing could use the fact of incarceration itself as a defense to abandonment under this definition.

"[Father] apparently managed to see the baby on one occasion over the holidays without notifying the DCS case manager of his intentions." We agree. In this case, Father's single, unannounced and unapproved visit in the span of more than four months amounts to token visitation. The findings make no mention of Father's alleged visit with B.P.C. on December 29, 2005. We presume that the court either found Father's testimony unconvincing on that point or that it viewed the visit, occurring outside the relevant four month period, to be token as well. Father testified to visiting B.P.C. only once during the eleven weeks (almost three months) following his first incarceration. He apparently made no effort to contact DCS to re-establish a visitation schedule, but, to support his drug habit, he did engage in criminal conduct that resulted in a second incarceration. Accordingly, Father's two unscheduled meetings constituted token visitation.

Mere non-payment of support or failure to visit is insufficient to establish abandonment under the first test of section 36-1-102(1)(A)(iv). *In re Audrey S.*, 182 S.W.3d at 864; *cf. In re Swanson*, 2 S.W.3d at 188. The parent must have *willfully* failed to support or visit the child.[4] Such failure is willful when the parent is aware of the duty, is capable of discharging it, makes no effort to do so, and has no justifiable excuse for the failure. *In re Audrey S.*, 182 S.W.3d at 864. The willfulness of the parent's actions or omissions depends upon his or her intent, which is almost always incapable of direct proof. *Id.* (citing *In re Adoption of S.M.F.*, No. M2004-00876-COA-R9-PT, 2004 WL 2804892, at *8 (Tenn. Ct. App. Dec. 6, 2004)(*no perm. app. filed*)); *State Dep't of Children's Servs.v. Culbertson*, 152 S.W.3d 513, 524 (Tenn. Ct. App. 2004). Circumstantial evidence, often drawn from the parent's actions or conduct, thus furnishes a factual basis from which the trier-of-fact can infer intent. *In re Audrey S.*, 182 S.W.3d at 864; *State Dep't of Children's Servs. v. Culbertson*, 152 S.W.3d at 524.

We find that clear and convincing evidence supports the Father's willful failure to visit and to support B.P.C. In this case, Father admittedly understood his obligations and the likely consequences of his failure to meet them. He also testified to assigning higher priority to crack cocaine than to his support and visitation obligations at the time he was using drugs. Although Father asserts that he was unable to visit and support his son while incarcerated, nothing in the record reveals what prevented him from doing so during the four months preceding his first incarceration. Father was capable of visiting B.P.C. during that time and made no effort to do so. He was likewise capable of supporting B.P.C. as required by the court order during those four months. We acknowledge that Father testified that he was not employed prior to his incarceration. A parent who fails to support a child because he or she is financially unable to do so, whether due to unsuccessful efforts or to an inability to generate income, has not willfully acted to the detriment of the child. *See In re Audrey S.*, 182 S.W.3d at 864 n.33 (citing cases involving unsuccessful employment efforts, including one coupled with support from relatives

[4] We note that the trial court is the proper court for making a determination as to willfulness, *see In re D.L.B.*, 118 S.W.3d at 367, and that the lower court here expressly found that Father willfully abandoned B.P.C. for more than four (4) consecutive months preceding his incarceration.

perceived as gratuitous). Father offered no evidence of unsuccessful attempts to find employment. He also testified to "supporting" his crack habit, and the DCS caseworker confirmed that he was employed at the time the court ordered him to pay twenty-five dollars ($25) per week. We do not view a parent who chooses to support a drug habit through means other than gainful employment as unable to make child support payments.

Neither did Father offer a justifiable excuse for non-payment or failure to visit during the relevant four months. Indeed, on appeal, Father does not invoke his drug habit to counter evidence of his willfulness. Rather, in his appellate brief, Father distinguishes between voluntary and involuntary conduct as follows:

> [T]he statutory ground for termination based on 'persistent conditions' was intended to cover situations where a parent persists in engaging in voluntary conduct that the parent is capable of stopping, such as drug abuse or alcohol abuse. It was not intended to cover a situation where the parent has, because of incarceration, the inability to alter his current situation.

During the four month period preceding his first incarceration, Father voluntarily used crack cocaine and voluntarily directed his efforts toward drugs rather than toward his known visitation and support duties. We therefore hold that clear and convincing evidence supports Father's willful failure to visit and support B.P.C.

We additionally find that the record supports the lower court's finding that "prior to incarceration [Father] engaged in conduct exhibiting a wanton disregard for the welfare of the child." Because incarceration alone is not an infallible indicator of parental unfitness, the second test for abandonment "allows the court . . . to determine whether the parental behavior that resulted in incarceration is part of a broader pattern of conduct that renders the parent unfit or poses a risk of substantial harm to the welfare of the child." *In re: Audrey S.*, 182 S.W.3d at 866. In this case, Father's second period of incarceration brought these facts within the abandonment provisions of section 36-1-102(1)(A)(iv), so we focus on Father's conduct prior to his most recent incarceration.

Within that span of time, Father developed a crack cocaine habit, engaged in criminal behavior as a result of his drug use, was incarcerated for that conduct, and failed to support B.P.C. or to engage in more than token visitation both before and after his first incarceration. This Court has held that conduct exhibiting a wanton disregard for the welfare of the child can include, alone or in combination, repeated incarceration, substance abuse, and criminal behavior. *In re: Audrey S.*, 182 S.W.3d at 867–68; *State Dep't of Children's Servs. v. J.M.F.*, No. E2003-03081-COA-R3-PT, 2005 WL 94465, at *7–8 (Tenn. Ct. App. Jan. 11, 2005), *perm. app. denied* (Tenn. Mar. 21, 2005); *In re C. LaC.*, No. M2003-02164-COA-R3-PT, 2004 WL 533937, at *7

(Tenn. Ct. App. Mar. 17, 2004)(*no perm. app. filed*); *In re C.T.S.*, 156 S.W.3d 18, 25 (Tenn. Ct. App. 2004). Each of the foregoing examples is present in this case. Father contended he was drug-free at the time of trial, one day after his release from jail, and that antidepressant medication had alleviated the depression symptoms that instigated his drug addiction in the first place. We first note that the inquiry under this subsection focuses on pre-incarceration conduct. Second, although Father's assertions might reveal a break from his pre-incarceration conduct, he did simultaneously propose to care for B.P.C. in the home of his abusive father, who had allegedly tried to set Father on fire when he was younger. We therefore find that before his second incarceration, Father exhibited a wanton disregard for B.P.C.'s welfare when he developed a crack cocaine habit, engaged in criminal conduct to support it (notwithstanding his previous incarceration), and willfully failed to visit or support his son. Accordingly, we hold that clear and convincing evidence proved abandonment under all tests set forth in Tennessee Code Annotated Section 36-1-102(1)(A)(iv).[5] Our inquiry now shifts to the lower court's best interests determination.

Best Interests Determination

The Code guides courts in the best interests determination by directing them to consider a non-exhaustive list of factors:

> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
>
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
>
> (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
>
> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
>
> (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

[5] Father also argues that DCS failed to make reasonable efforts toward reunification, but this assertion, even if proven, does not vitiate the finding of abandonment. Tennessee law expressly imposes upon DCS the obligation to make reasonable efforts toward reunification by helping the parent correct the circumstances leading to the child's removal from the home. Tenn. Code Ann. § 37-1-166 (2005). Where aggravated circumstances exist, the law absolves DCS of this responsibility. *See* § 37-1-166(g)(4)(A) (referencing the definition of aggravated circumstances at Tenn. Code Ann. § 36-1-102(9)). Pursuant to Section 36-1-102(9), abandonment is an aggravated circumstance, and the termination of parental rights on this ground does not require a showing of reasonable efforts on the part of DCS. *State Dep't of Children's Servs. v. D.D.T.*, No. M2006-00671-COA-R3-PT, 2006 WL 2135427, at *1 (Tenn. Ct. App. July 31, 2006)(*no perm. app. filed*).

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i)(2005). When considering the child's best interests, the court must take the child's, rather than the parent's, perspective. *In re Audrey S.*, 182 S.W.3d at 878; *White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004). To ascertain whether a permanent severance of the parent-child relationship is in the child's best interests, the court must engage in a fact-intensive endeavor, but it need not provide a "rote examination" of each factor and calculate which result is supported by the most factors. *In re Audrey S.*, 182 S.W.3d at 878. Each case presents different facts and circumstances that dictate the relevance of and weight accorded to each factor. *Id.*

The juvenile court made extensive findings of fact and specifically found that termination was in the best interests of B.P.C. Father argues that the lower court failed to make specific findings of fact regarding the best interests factors and that he cannot discern the court's reasoning underlying its conclusion. We find this argument to be disingenuous. The court's findings of fact reveal a nineteen year old father who developed a crack cocaine habit and repeatedly engaged in criminal conduct to support it; who was incarcerated twice as a result of his criminal conduct; who understood the need to secure safe and stable housing eighteen (18) months prior to trial but failed to do so; who admitted to concealing his drug habit from DCS; who was raised by an abusive father yet proposed at trial to care for B.P.C. in his father's home; who last saw his son with the approval and knowledge of DCS approximately thirteen (13) months before trial; who severed all contact with DCS after that last visit, the same day the court ordered him to pay child support; who made no child support payments for the benefit of B.P.C. but instead supported his drug habit; who knew the likely consequences of his failure to visit and support his son; and who acknowledged his history of instability due to depression and other mental health issues, as manifested by multiple suicide attempts. And, viewed from the perspective of B.P.C., the court's findings reveal a nineteen month old child who is thriving under the care of his great aunt; who has lived with her for at least fifteen of his nineteen months of life; who does not know Father; who has seen Father two times in the past thirteen months;

and who would likely achieve permanency through adoption by his great aunt, the only parental figure he knows. It is undisputed that B.P.C. is in a stable and loving environment that promises permanence. To sever B.P.C.'s relationship with the only parental figure he has known would unquestionably have a negative emotional effect upon him.

Of all the nine (9) factors, only the second one falls short of unequivocally weighing in favor of termination. It addresses the parent's failure to make a lasting adjustment following the reasonable efforts of social services agencies. Given our conclusions regarding the persistent conditions and permanency plan grounds, there appears to be insufficient information to conclude that Father has failed on this point. Nevertheless, this conclusion does not undercut the juvenile court's best interests determination. The record does reveal that Father knowingly concealed his drug habit from DCS out of embarrassment and a certain belief that he did not have a problem. The record also reveals that ruling against the termination of Father's rights will prolong the possibility of a permanent placement for B.P.C. Father is essentially asking for a second chance and argues that termination is not in B.P.C.'s best interest because he will grow up without knowing his father. According to the juvenile court judge's statements in the trial transcript, Father's stated intentions are sincere and his beliefs heartfelt. Even so, under Tennessee law, such sincerity and determination sometimes cannot undo the legal effects of a parent's past behavior. Unfortunately, Father's past conduct constituted abandonment. And, viewed from B.P.C.'s perspective, the overwhelming weight of the factors supports the termination of Father's parental rights and reveals that an opposite result would require the undue assumption of known risks at B.P.C.'s expense.

For the foregoing reasons, we affirm the trial court's order terminating Father's parental rights. Costs of this appeal are taxed to D.L.C. (Father) and his surety, for which execution shall issue if necessary.

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DAVID R. FARMER, JUDGE